No. 89-1091

IN THE

Supreme Court of the United States

October Term, 1989

THOMAS K. SOBOL, as Commissioner of the New York State Education Department,

Petitioner,

v.

CLIFFORD BURR, by his Parents and Next Friends, KENNETH BURR, BETTY BURR,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether the Action Is Moot, Since the Plaintiff Will Complete the Educational Term Awarded by the Hearing Officer on June 21, 1990, Regardless of Any Decision Rendered by This Court.

II. Whether the Unique Facts and Limited Precedential Value of This Case Make It an Inappropriate Case in Which to Grant a Writ of *Certiorari*.

III. Whether the Reinstatement Relief Fashioned by the Court of Appeals Removes the Case From the Scope of the Eleventh Amendment.

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STATUTORY PROVISIONS

42 U.S.C. § 2000d-7(a)(1) (Supp. 1988) provides:

> A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 794 of Title 29, title IX of the Education Amendments of 1972, the Age Discrimination Act of 1975, title VI of the Civil Rights Act of 1964, or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Clifford Burr, by his parents and next friends, Kenneth and Betty Burr, respectfully requests that this Court deny the petition for a writ of *certiorari* seeking review of the opinion and judgment of the United States Court of Appeals for the Second Circuit. That opinion is reported at 888 F.2d 258 (2d Cir. 1989).

Statement of the Case

Clifford Burr is a severely handicapped young man who suffers from blindness, profound mental retardation, and cerebral palsy. Appendix ("App.") at 45a.[1] In 1984, the private school he attended at public expense under the Education of the Handicapped Act ("EHA") closed. Thereafter, since the New York City Board of Education could not arrange appropriate placement for Clifford,[2] his parents requested that petitioner, the New York State Commissioner of Education ("Commissioner"), appoint Clifford to a "state-operated" or "state-supported" school. The Commissioner then referred Clifford to the New York Institute for the Education of the Blind ("Institute"), a state-supported school. App. at 4a. The Institute took more than twice the permitted length of time to complete its evaluation of Clifford, and then rejected him on the ground that it allegedly did not have an appropriate program from which he could benefit.[3] App. at 46a-47a.

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1. Citations to the Appendix refer to the supplementary appendix filed in conjunction with the petition for *certiorari*.

2. After receiving notification of the plan to close Clifford's private school, the Committee on the Handicapped ("COH") of Clifford's local school district initially recommended placement in a proposed program at P.S. 396 in Brooklyn, New York. App. at 80a. After the Burrs objected that the school had not yet developed a curriculum, App. at 80a, 95a, and the assistant superintendent of citywide programs expressed doubts as to whether this program was appropriate for Clifford, App. at 36a, the COH withdrew its recommendation and determined that there was no appropriate program for Clifford in the New York City public school system. App. at 36a. Subsequently, the P.S. 396 placement was reinstated, App. at 108a n.21, and an impartial hearing officer ruled that the P.S. 396 placement was inappropriate. App. at 40a, 109a n.23. That decision was not appealed by the New York City Board of Education and is therefore final.

3. As the Hearing Officer found, the Institute failed to mention its Frampton Hall Program which enrolled blind, profoundly retarded students similar to Clifford. App. at 111a-115a.

The combination of the illegal delays and the wrongful rejection kept Clifford out of school for nearly two full school years.

a. Administrative Proceedings

The Burrs promptly requested a hearing on December 21, 1984, in accordance with the procedures under the EHA and similar New York State regulations. 20 U.S.C. § 1415(b)(2); N.Y. Comp. Codes R. & Regs. tit. 8, § 200.7(d) (1986). The Commissioner appointed a hearing officer as provided in the then applicable N.Y. State regulations.[4] Although the EHA requires that a hearing officer *render a decision* within 45 days after the request for a hearing, 34 C.F.R. § 300.506, the Burrs' hearing did not even begin until four months after the request, and concluded eight months later. Consequently, the decision of the hearing officer was not rendered until January 27, 1986, more than a year after the Burrs' request for a hearing.

The hearing officer allowed testimony on many issues which he later found irrelevant; he subsequently acknowledged this, stating, "It is readily apparent in retrospect that the hearing could have, and should have, been curtailed.... I should have restricted Respondent [Institute] in regard to issues." App. at 109a n.23. The Commissioner himself subsequently concluded that "[t]he delay in this instance appears to be attributable *solely* to the management of the hearing by the hearing officer, and is unconscionable." App. at 42a (emphasis added).

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4. The regulations have since been amended. *See infra* p. 6 n.9.

The hearing officer found that the Institute was an appropriate placement for Clifford, and in recognition of Clifford's failure to receive appropriate education during the unlawfully protracted proceedings, ordered that Clifford's education be extended until the end of the school year in which he reaches the age of 22 years. App. at 118a, 121a.

The Institute then appealed the decision to the Commissioner, and once again illegal delays ensued. Although the EHA provides that decisions of hearing officers appointed by the state educational agency be final except for judicial review,[5] the Commissioner accepted the appeal. Furthermore, although EHA regulations require that administrative appeals, where permitted, be decided in 30 days,[6] the Commissioner took 49 days.

Although the Commissioner agreed with the hearing officer that the Institute was an appropriate placement for Clifford, and that the delays in the administrative process had been "unconscionable," he nevertheless rejected the hearing officer's order to extend the period of Clifford's education. App. at 42a.

As a result of the protracted administrative proceedings, Clifford remained out of school from September 1984 until June 10, 1986, almost two full school years. During that period, Clifford received no education whatsoever, aside from intermittent home tutoring provided by the New York City Board of Education.

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5. 20 U.S.C. §§ 1415(e)(1), 1415(e)(2).

6. 34 C.F.R. § 300.512(b).

b. Proceedings in the District Court

Clifford, by his parents, commenced this action in September 1986 in the United States District Court for the Southern District of New York. App. at 28a. The complaint, as amended, sought to reinstate that portion of the decision of the hearing officer that extended Clifford's education under the EHA to the end of the school year in which he attains the age of 22.[7] A supplemental complaint was later filed asserting a claim against the petitioner for attorneys' fees arising from the administrative proceedings in which Clifford prevailed on the issue of appointment to the Institute. App. at 19a n.1.

On November 9, 1987, the district court (Carter, J.) issued an opinion dismissing Clifford's claims against the petitioner. App. at 32a. On March 9, 1988, the district court denied the claim for attorney's fees against the petitioner for the administrative process, and granted Clifford leave to file an amended supplemental complaint seeking such fees from the Institute, which the court found was the adverse party in the administrative proceedings. App. at 25a. On March 18, 1988, the district court certified all claims against the petitioner for appeal pursuant to Fed. R. Civ. P. 54(b). App. at 5a.

c. Proceedings in the Court of Appeals

Clifford appealed the district court's order dismissing his claims against petitioner to the United States Court of Appeals for the Second Circuit (Feinberg, C.J.), which exercised jurisdiction over the due process claims and reversed the judgment of the district court.[8] The court found that

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7. In the alternative, Clifford sought an award of compensatory education. App. at 31a.

8. The court of appeals ruled that, given the pendency of the attorney's fees claim against the Institute, the district court exceeded its discretion in certifying the attorney's fees claim against petitioner, and, therefore the

Clifford was injured by the delays in the hearing process, and concluded that petitioner's review of the hearing officer's decision violated the finality and impartiality provisions of the EHA. App. at 11a. In an opinion reported at 863 F.2d 1071 (2d Cir. 1988), the court vacated the Commissioner's decision and reinstated the final decision of the state-appointed impartial hearing officer who had extended Clifford's education for one year to provide him the full educational period required by the EHA. App. at 16a-17a.

Specifically, the court found that the protraction of Clifford's hearing for 13 months "grossly violated" the time limits mandated by both federal and New York regulations. App. at 9a. The court further determined that the State Commissioner's review of the state-level hearing officer's decision violated both the finality[9] and impartiality[10] requirements of the EHA. 20 U.S.C. §§ 1415(e)(1), 1415(c); App. at 11a-13a.

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court lacked jurisdiction over the attorney's fees claim against the Commissioner on the appeal. App. at 7a.

9. While New York State regulations permitted petitioner to review the decision of the state appointed hearing officer, *see* N.Y. Comp. Codes R. & Regs. tit. 8, §§ 200.5(d), 200.7(d)(1) (1987), the controlling provisions of the EHA prohibited such review by mandating that the decision of a state-appointed hearing officer be final. App. at 12. The court noted that the United States Department of Education had warned the New York Department of Education that the New York regulations in question might not be federally approved, unless they were changed to conform with the requirements of the EHA. App. at 12a. Thereafter, the New York State Education Department, in 1987, amended its regulations so that a local school board, rather than the Commissioner, appoints the hearing officer where state-supported schools are involved. *See* N.Y. Comp. Codes R. & Regs. tit. 8, § 200.7(d)(ii) (1987).

10. The court determined that the Commissioner was not an impartial review officer in the unusual circumstances of this case "because he has extensive responsibilities and is integrally involved with the operation of state-supported schools, such as the Institute." App. at 13a.

In light of these violations of the EHA, the court vacated the Commissioner's decision, thereby reinstating the decision of the hearing officer. In finding that this action did not implicate the eleventh amendment, the court stated:

> [W]e believe that it is possible to reinstate the relief fashioned by the hearing officer without addressing the eleventh amendment issue. This panel is merely vacating the decision of the Commissioner, and reinstating the decision of the hearing officer. The hearing officer is a decisionmaker designated by the State and is not constrained by the eleventh amendment.

App. at 16a. The court further noted that, in any event, the relief awarded to Clifford was "purely prospective in nature, and any effect on the state treasury is ancillary to such relief and therefore permissible despite the eleventh amendment." App. at 17a.

Accordingly, the court reversed the district court's order and remanded to the district court with instructions to vacate the Commissioner's decision and reinstate the hearing officer's decision. The court's judgment was entered on December 12, 1988.

d. Prior Proceedings in this Court

The Commissioner petitioned this Court for a writ of *certiorari* to review the judgment of the Court of Appeals for the Second Circuit while *Dellmuth* v. *Muth*, 491 U.S. ___, 109 S. Ct. 2397 (1989) was pending before this Court. This Court then decided *Dellmuth*, holding that the EHA did not abrogate states' eleventh amendment immunity. This Court subsequently granted *certiorari* in *Burr*, vacated the judgment of the Second Circuit, and remanded the case "for further consideration" in light of its decision in *Dellmuth*. *Sobol* v. *Burr*, 491 U.S. ___, 109 S. Ct. 3209 (1989).[11]

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11. A bill recently passed the United States Senate which would overrule the result in *Dellmuth* by clarifying congressional intent to abrogate states' immunity under the EHA. *See infra* p. 10 & n.13.

e. Proceedings on Remand to the Second Circuit

Pursuant to this Court's mandate, the Second Circuit vacated its judgment on August 3, 1989, and subsequently asked the parties to submit briefs as to the effect of *Dellmuth* on its prior decision in *Burr,* 863 F.2d 1071 (2d Cir. 1988). After receiving the briefs, the court reaffirmed its prior holding and reinstated the decision of the impartial hearing officer, noting the unique nature of this relief and adhering to its position that its holding did not implicate the eleventh amendment:

> We did not base our holding in *Burr* on the abrogation of the states' Eleventh Amendment immunity because we did not believe it was necessary to reach that question in that case. . . . We concluded, for two alternative reasons, that the amendment was not violated. First, *our decision merely vacated a decision of the Commissioner of the New York State Education Department and reinstated the decision of a state hearing officer,* whose award of relief is not limited by the Eleventh Amendment. Second, *the relief granted the handicapped youth was prospective in nature, and any effect on the state treasury would be ancillary to such relief and therefore permissible despite the Eleventh Amendment.* . . . We have considered the effect of *Muth,* and we continue to believe that the Eleventh Amendment is not violated in this case.

Burr, 888 F.2d at 259 (emphasis added).

Clifford, who turned 22 in December, 1989, is currently attending school at the Institute, and will complete his final term there on June 21, 1990.

REASONS WHY THE PETITION SHOULD BE DENIED

I.

The Action Has Become Moot, Since Clifford Will Complete the Educational Term Awarded by the Hearing Officer on June 21, 1990, Regardless of Any Decision Rendered by This Court.

Clifford, by his parents, brought this action on his own behalf to regain the one year of education that the hearing officer granted in January 1986. He will complete that school year on June 21, 1990. It is unlikely that this Court would reach a decision on the merits and issue a mandate before that date.[12] Therefore, since Clifford has been admitted for his final term at the Institute and will complete his term there regardless of any decision on the merits rendered by this Court, there is no longer a "live" case or controversy for this Court to review. *See DeFunis* v. *Odegaard,* 416 U.S. 312, 319 (1974) (holding an action to be moot where "the petitioner will complete his law school studies at the end of the term for which he has now registered regardless of any

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12. This brief in opposition is due on February 3, 1990, and considering the timetable for appeals and the fact that the last date scheduled for oral argument this term is April 21, 1990, it is unlikely that this case would be heard before the October 1990 Term unless the case were disposed of summarily. If *certiorari* were granted as early as February 14, the petitioner's brief would be due on March 31 at the earliest (Sup. Ct. R. 25.1); respondent's brief would be due on April 30 at the earliest (Sup. Ct. R. 25.2); and the petitioner would have until May 30 at the earliest to reply (Sup. Ct. R. 25.3). Thus, it is unlikely that oral argument would be heard this term, and the case would then be put over until October 1990, months after Clifford completes his education at the Institute.

Even if this case were heard on an expedited basis, it is still unlikely that a decision and mandate would issue before Clifford completes his final term at the Institute.

decision this Court might reach on the merits of this litigation").

This case clearly does not present a question that is "capable of repetition, yet evading review." *See Roe* v. *Wade*, 410 U.S. 113 (1973). This action was an individual complaint brought on Clifford's behalf. Because Clifford will no longer have any right to education under the EHA after June 1990, there is no possibility that he could suffer the same wrong again. This action is certainly not "capable of repetition" as far as Clifford is concerned. *See DeFunis*, 416 U.S. at 319. *Cf. Honig* v. *Doe*, 484 U.S. 305 (1988) (holding an EHA action was not moot where a plaintiff was only 20 and could suffer the same wrong again). Furthermore, as in *DeFunis*, there is no reason why the issues in this case would necessarily evade review.

In addition, there is pending legislation which would moot the eleventh amendment issue. A bill recently passed by the United States Senate provides that under the EHA "[a] State shall not be immune under the eleventh amendment of the Constitution of the United States from suit in Federal Court." S. 1824, 101st Cong., 1st Sess. § 3 (1989).[13] This legislation would explicitly overrule the result in *Dellmuth* by clarifying Congress' intent to abrogate states' eleventh amendment immunity under the EHA.

This Court should therefore deny the petition for *certiorari* since the case at bar and the issues it presents have become moot.

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13. The Bill, tentatively entitled the "Education of Individuals with Disabilities Act of 1989," was passed by the Senate on November 16, 1989, and is presently pending before the House of Representatives, where passage is likely.

II.

The Court of Appeals' Decision Raises No Issues of Precedential Importance Beyond the Unique Facts of This Case, and Also Does Not Present an Issue Under the Eleventh Amendment.

The facts of the *Burr* case are unique, and differ in almost every respect from the typical special education case in the federal courts. These facts led the court of appeals to reinstate the hearing officer's decision, a novel award of prospective relief which will almost certainly never be duplicated in the special education context. The decision of the court of appeals therefore raises no issues of precedential importance, and does not violate the eleventh amendment.

A. The unique facts of the case and relief fashioned by the court of appeals, the fact that the state regulations on which the Commissioner relied have been changed, and the likelihood of congressional action to abrogate states' immunity under the EHA, makes this an inappropriate case in which to grant a writ of *certiorari*.

The circumstances of this case are unusual, and will almost certainly never be repeated. First, the protracted administrative hearing which the court of appeals found violative of the act was extraordinary: there were sixteen hearing days conducted over a period of more than one year. App. at 52a. In addition, the injury which Clifford suffered due to this delay was compounded by factors not typical in the special education context.[14] Because of the closing of his state-funded private school placement, Clifford remained out of school

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14. The State eventually acknowledged its responsibility for causing the delays which led to Clifford's loss of education time. *See supra* p. 3.

during the entire pendency of the administrative proceeding, nearly two full school years. In the typical special education hearing and appeal, the "stay put" provisions of the EHA, 20 U.S.C. § 1415(e)(3), would have prevented the occurrence of such an exclusion from school. The situation was exacerbated by the fact that Clifford's parents were unable to front the costs of his education in a private school. This combination of circumstances led the hearing officer to extend Clifford's education, in an effort to provide him meaningful relief. The court of appeals agreed and reinstated that decision. App. at 16a-17a.

This case is also unique in that the administrative review process which the court of appeals found to be violative of the impartiality and finality requirements of the EHA, has been revamped. *Compare* N.Y. Comp. Codes R. & Regs. tit. 8, § 200.7(d) 1986 *with* § 200.7(d) (1987). A dispute between a parent and the Commissioner over appointment to a state-supported school is no longer resolved by the Commissioner, as was true in Clifford's case, but by an independent state-level review officer.[15] As the court of appeals noted, the United States Department of Education had warned the New York Department of Education that the New York regulations in question might not be federally approved, unless they were changed to conform with the requirements of the EHA. App. at 12a. Thereafter, in 1987, the New York State Education Department amended its regulations.

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15. Even the original process that the court of appeals considered is of no national importance. Only three states, Pennsylvania, New York and Minnesota, retain a system of chief state school officer review. Amicus Brief of American Civil Liberties Union, et al. at 19, *Dellmuth* v. *Muth*, 109 S. Ct. 2397 (1989) (No. 87-1855).

In addition, it was not the court that granted the award of compensatory education here, which is the usual situation; rather, it was a state-level hearing officer who granted Clifford a period of education to make up for the schooling he had lost due to the administrative delay. The court of appeals merely reinstated that decision. Also, in contrast to the monetary relief commonly requested by plaintiffs in EHA actions,[16] Clifford simply sought reinstatement of a favorable decision.

Furthermore, this case is also unique because, after this action was filed, Congress amended the Rehabilitation Act of 1973 to make clear its intent to abrogate states' eleventh amendment immunity. *See* 42 U.S.C. § 2000d-7(a)(1) (Supp. 1988). Congress also amended the EHA to provide parents and children a remedy under the Rehabilitation Act for education claims of handicapped students. 20 U.S.C. § 1415(f). These statutory developments further diminish the likelihood that the controversy involved here will be repeated.

Finally, a bill recently passed the United States Senate which would make clear Congress' intent to abrogate states' eleventh amendment immunity under the EHA, and therefore would ensure the lack of precedential value of this case.[17]

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16. *See, e.g., Susan R.M.* v. *Northeastern Independent School District*, 818 F.2d 455 (5th Cir. 1987); *Alexopoulos* v. *San Francisco School District*, 817 F.2d 551, 553 (9th Cir. 1987); *Gallagher* v. *Pontiac School District*, 807 F.2d 75, 76 (6th Cir. 1986); *Wexler* v. *Westfield Board of Education*, 784 F.2d 176 (3d Cir.), *cert. denied*, 479 U.S. 825 (1986). Since the petitioner relies on all of the above cases at various points throughout the petition, *see* Petition at 11, 14, 17, it is particularly noteworthy that Clifford sought only equitable reinstatement relief, and not money damages as did the plaintiffs in all of the above actions.

17. *See supra* p. 10 & n.13.

B. Furthermore, the novel reinstatement relief fashioned by the court of appeals does not violate the eleventh amendment.

In its decision, the court of appeals found that the eleventh amendment was not implicated by its reinstatement of the state-level hearing officer's decision, stating:

> We did not base our holding in *Burr* on the abrogation of the states' Eleventh Amendment immunity because we did not believe it was necessary to reach that question in that case. . . . We concluded, for two alternative reasons, that the amendment was not violated. First, *our decision merely vacated a decision of the Commissioner of the New York State Education Department and reinstated the decision of a state hearing officer*, whose award of relief is not limited by the Eleventh Amendment. Second, *the relief granted the handicapped youth was prospective in nature, and any effect on the state treasury would be ancillary to such relief and therefore permissible despite the Eleventh Amendment*. . . . We have considered the effect of *Muth*, and we continue to believe that *the Eleventh Amendment is not violated in this case*.

Burr, 888 F.2d at 259 (emphasis added). Thus, this Court should not grant *certiorari* as this case presents no eleventh amendment issue.[18]

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18. Similarly, in its original decision, the court of appeals noted that:

> This panel is merely vacating the decision of the Commissioner, and reinstating the decision of the hearing officer. The hearing officer is a decisionmaker designated by the State and is not constrained by the eleventh amendment. Therefore, *we do not implicate the eleventh amendment by expunging the bar to his decision*.

App. at 16a (emphasis added).

The Second Circuit clearly rested its grant of relief to Clifford on grounds entirely outside the scope of the *Dellmuth* holding and the eleventh amendment. *Burr*, 888 F.2d at 259; App. at 16a-17a. Because the state commissioner violated the EHA's finality requirement by improperly vacating an impartial hearing officer's decision, the court simply reinstated the decision of the hearing officer, relief which is "purely prospective in nature." App. at 17a. The court did not consider the eleventh amendment a bar to Clifford's recovery, concluding that the reinstatement of the hearing officer's decision "d[id] not implicate the eleventh amendment." App. at 16a. The decision of the court of appeals did no more than void the Commissioner's illegal review and reinstate the hearing officer's decision. Therefore, it did not involve a control of the actions of state officials by federal courts which is barred by the eleventh amendment.

Furthermore, the relief sought by Clifford, while perhaps "'compensatory' in nature," is simply equitable reinstatement relief and is purely prospective in effect. *See Milliken* v. *Bradley*, 433 U.S. 267, 290 (1977). In *Milliken*, the Sixth Circuit affirmed an order to implement remedial education programs designed to remedy the continuing effects of past racial discrimination. *Id.* at 277-78. In upholding this relief, this Court held that the remedial education programs were entirely prospective in character despite the fact that the state would be required to pay one-half the costs of the programs. *Id.* at 288-290. This Court concluded that the programs, while "'compensatory' in nature. . . . [we]re part of a plan that operates *prospectively* to bring about the delayed benefits" of the state's educational system. *Id.* at 290. Clifford's underlying compensatory education claim is similarly prospective in operation, and therefore is permissible

under the eleventh amendment,[19] notwithstanding any ancillary effect on the state treasury. App. at 16a. *See Edelman* v. *Jordan*, 415 U.S. 651, 668 (1974). Thus, even if the court of appeals had directly ordered the State to provide compensatory education, that order would not have violated the eleventh amendment since such relief would be substantially identical to that approved by *Milliken*.[20]

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19. Petitioner argues that the relief awarded here "was designed solely to compensate an individual plaintiff for past violations of law," and that, therefore, *Milliken* is not controlling. Petition at 16. Petitioner, however, has failed to acknowledge the State's pattern and practice of denying handicapped students a free appropriate education, circumstances similar to the history of segregation sought to be remedied by the Court in *Milliken*. *See Jose P.* v. *Ambach*, 557 F. Supp. 1230, 1233, 1241 (E.D.N.Y. 1983) (judgment declaring that State had failed to provide free appropriate education to handicapped students was sustained, since court found a "history of over a decade of failure to accord the handicapped their rights").

20. A number of decisions are in agreement with this point. *See, e.g., Miener* v. *State of Missouri*, 800 F.2d 749, 754 (8th Cir. 1986) (Eighth Circuit holds that plaintiff could be granted a compensatory education award if she could prove a violation of the EHA by the State — which Clifford successfully proved here — based on this Court's decision in *Burlington School Committee* v. *Department of Education*, 471 U.S. 359 (1985), which held that monies which would have been spent all along if not for official misconduct, are not damages); *Lester H.* v. *Carroll*, No. 86-6852 (E.D. Pa. Nov. 9, 1989) (LEXIS, Genfed library, Dist file) (two and one-half year compensatory education award "is appropriate relief under EHA" because "[t]here is no bar to such recovery ... imposed by the eleventh amendment"). *See also Jefferson County Board of Education* v. *Breen*, 853 F.2d 853, 857-58 (11th Cir. 1988) (Eleventh Circuit orders two years of compensatory education beyond the age of 21).

On the other hand, *Alexopoulos* v. *San Francisco School District*, 817 F.2d 551 (9th Cir. 1987), states that compensatory education in EHA cases is more akin to damages than to the prospective relief approved in *Milliken*. However, that statement was wholly unnecessary to the decision, since the court ultimately held that the plaintiff's claims were either meritless or timebarred. *Id.* at 556.

Neither *Green* v. *Mansour*, 474 U.S. 64 (1985), nor *Papasan* v. *Allain*, 478 U.S. 265 (1986) require a different result. Neither case involved a state-level determination which could be reinstated by a federal court finding a violation of federal law. Furthermore, unlike Clifford Burr, the plaintiffs in *Green*[21] and *Papasan*[22] could not claim an ongoing violation of federal law. Here, Clifford suffered an ongoing violation of the EHA because, absent the relief ordered, Clifford would continue to be denied the amount of education the EHA guarantees. In any event, as discussed above, the relief awarded by the state-level hearing officer is virtually identical to that awarded in *Milliken*.

The EHA was enacted in response to a long history of discrimination in education and to many court decisions affirming a constitutional right to equal educational opportunities.[23] To combat discrimination against handicapped

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21. In *Green*, any claim the plaintiff welfare recipients had to prospective relief, which would have been permissable under *Ex Parte Young*, 209 U.S. 123 (1908), was moot since Congress had amended the relevant federal statute so that the state regulations at issue no longer violated federal law. *Green*, 474 U.S. at 68-73.

22. In *Papasan*, this court rejected, as violative of the eleventh amendment, a claim that Mississippi officials could be required to make monetary payments for past breaches of trusts that were created for the benefit of public schools. *Papasan*, 478 U.S. 280-81. Nevertheless, the Court held that an equal protection claim based on the present unequal distribution of the benefits of the state's school lands was the type of ongoing violation for which a remedy may be permissibly fashioned under *Ex Parte Young*, 209 U.S. 123 (1908). *Papasan*, 478 U.S. at 282.

23. "Regrettably, equal educational opportunity has yet to become a reality for millions of handicapped children... for years, handicapped children have been kept in the dark, deprived of a free, full public education." 121 Cong. Rec. H37,030 (1975).

Also, the Senate Report accompanying the EHA emphasized that the Supreme Court's 1954 desegregation decision in *Brown* v. *Board of Education*, 347 U.S. 483 (1954), established that the Constitution guarantees

children and to ensure their rights to equal education, the EHA mandates that all handicapped children between the ages of 3 and 21 receive a free appropriate public education. 20 U.S.C. § 1412(2)(B). Congress intended that handicapped children receive appropriate education for 18 years, and not just in those periods when state officials agree to comply with the EHA.[24] Without the ability to award even prospective injunctive relief, courts would be powerless to correct state violations of the EHA, and, as the court of appeals noted, "Clifford's right to an education between the ages of three and twenty-one [would be] illusory."[25] App. at 15a. The Second Circuit's decision, which did no more than expunge the state Commissioner's unlawful review and reinstate the impartial hearing officer's decision, is a necessary and appropriate response to an egregious violation of federal law by a state official.

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the opportunity of an education as "a right which must be made available to all on equal terms." S. Rep. No. 168, 94th Cong., 1st Sess. 6, *reprinted in* 1978 U.S. Code Cong. & Admin. News 1425, 1430.

24. Because Clifford was 7 years old when the EHA was enacted, he was entitled to 14 full years of education.

25. *See also Jefferson County Board of Education* v. *Breen*, 853 F.2d 853, 857-58 (11th Cir. 1986) ("[c]ompensatory education . . . is necessary to preserve a handicapped child's right to a free appropriate education").

CONCLUSION

For these reasons, the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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